No. 07-749

In the Supreme Court of the United States

CHARLES W. WALKER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. a. Whether the district court clearly erred in finding that petitioner's purportedly race-neutral explanations for the exercise of his peremptory challenges were pretextual.

b. Whether white males constitute a cognizable class under *Batson* v. *Kentucky*, 476 U.S. 79 (1986).

c. Whether peremptory strikes based on "mixed motives" are permissible.

d. Whether the district court abused its discretion in re-seating the improperly struck jurors.

2. a. Whether a public official defrauds the public of his honest services, in violation of 18 U.S.C. 1341 (2000 & Supp. V 2005) and 18 U.S.C. 1346, when he demands personal benefits from a party in exchange for promises to confer legislative benefits on that party.

b. Whether the government must prove that a state public official has violated duties imposed under state law in order to sustain a mail fraud conviction for deprivation of honest services.

3. Whether petitioner's above-Guidelines sentence is affected by this Court's disposition of *Gall* v. *United States*, 128 S. Ct. 586 (2007), and *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 490 F.3d 1282. The order of the district court (Pet. App. 35-49) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2007. A petition for rehearing was denied on September 10, 2007 (Pet. App. 33-34). The petition for a writ of certiorari was filed on December 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of multiple counts of mail fraud, in viola-

tion of 18 U.S.C. 1341 (2000 & Supp. V 2005) and 18 U.S.C. 1346; two counts of conspiring to commit mail fraud, in violation of 18 U.S.C. 371; and aiding and assisting the preparation of a false tax return, in violation of 26 U.S.C. 7206(2). He was sentenced to 121 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-32; Judgment 2, 4; Verdict 1, 5.

1. Petitioner was a Georgia state legislator. At the same time he held public office, petitioner published the Augusta Focus, a local newspaper, and owned the CWW Group, Inc., a holding company, as well as Georgia Personnel Services, Inc. (Georgia Personnel), an agency that provided temporary workers to hospitals and other companies. Pet. App. 2.

The indictment charged petitioner with engaging in five separate fraudulent schemes.[1] Two of the schemes involved petitioner's misuse of his public office. In one such scheme, according to the indictment, petitioner agreed to promote legislation that benefitted Grady Memorial Hospital (Grady) in exchange for the hospital's hiring of workers from Georgia Personnel. In the other, the indictment alleged, petitioner misrepresented his ownership interest in Georgia Personnel and the Augusta Focus so that he could enter into a contract with the Medical College of Georgia (Medical College), a state entity, in circumvention of Georgia ethics and conflict of interest laws, and that he failed to disclose his ownership of the companies and his business transactions with the Medical College in financial disclosure forms submit-

[1] The indictment also charged petitioner's daughter and his three companies in various counts. His daughter's case was severed, and she later pleaded guilty. Petitioner was tried with the three corporate defendants.

ted to the State. The indictment alleged that such conduct constituted both "money or property" mail fraud, in violation of 18 U.S.C. 1341 (2000 & Supp. V 2005), and "honest services" mail fraud, in violation of 18 U.S.C. 1346. Pet. App. 2-4 & n.3, 21, 26; Indictment 8, 20-34.

2. After making initial disqualifications for cause, the district court randomly selected a pool of 42 prospective jurors, 28 of whom constituted the group from which the parties would exercise their peremptory challenges; 8 of whom constituted the pool of alternate jurors; and 6 of whom were available if needed. The 28-person pool consisted of 12 white males, 6 white females, 1 black male, 8 black females, and 1 Indian male; the alternate pool included 4 white males, 2 white females, and 2 black females. Petitioner and his corporate co-defendants exercised all 12 of their peremptory challenges against white males, removing 10 white males from the larger pool and 2 white males from the alternate pool. Pet. App. 6.

The government objected to the defendants' peremptory challenges, claiming that they were made on the basis of race, in violation of *Batson* v. *Kentucky*, 476 U.S. 79 (1986).[2] The district court asked defendants' counsel to provide "racially neutral reasons for striking each of those jurors," 5/23/05 Tr. 258, and defense counsel explained their rationale for each of the initial 10 strikes, *id.* at 258-269. As to the four jurors at issue here, counsel explained that juror number 160 was struck because he had experience in accounting and the defendants intended to challenge the government's accounting procedures in the case, *id.* at 258; juror number

[2] Petitioner also challenged (unsuccessfully) the government's peremptory challenges on *Batson* grounds. Pet. App. 7 & n.8. He does not renew that claim here.

56 was struck because he supervised a large number of employees, *id.* at 268; juror number 69 was struck because of his body language, mannerisms, "and just the way that he looked at us and our client," *id.* at 266; and juror number 159 was struck because he previously had served on a city council in his small town, *id.* at 267. The government responded that each of those explanations was pretextual. Pet. App. 7-9.

The district court found that the government had established a prima facie case that the defendants' challenges were based on race.[3] It based that finding on the "inference of discrimination" created by the statistical improbability that the strikes were not related to race and the "totality of the circumstances." Pet. App. 44. It then reviewed defendants' "race neutral explanation[s]" to determine whether the reasons were "actual, genuine, true or real reason[s] for the exercise of the peremptory challenges," as opposed to whether they were "good or bad reason[s]." 5/23/05 Tr. 278. It concluded that the government met its burden of establishing that the defendants had engaged in purposeful discrimination in striking juror numbers 160, 69, 159, and 56, but not in striking the six other white males. Pet. App. 46-47; 5/23/05 Tr. 279-282.

As a result, the district court re-seated the four improperly struck jurors and denied defendants' request for four additional peremptory strikes. 5/23/05 Tr. 282-284. The prosecutor noted that defendants had agreed to dismiss the remaining potential jurors before the parties exercised their strikes, and the court noted that granting defendants' request would have required "be-

[3] The district court made clear that it was not treating "white males" as a discrete group, but instead was reviewing the challenges for racial discrimination. Pet. App. 39-40 n.12.

ginning this jury selection anew," which was "impractical, ponderous and unworkable." *Id.* at 284. The court also stated that, based on the nature of the *Batson* violations, "the dismissal of the venire in this case would have been an ephemeral remedy." Pet. App. 49.

3. At trial, the government presented evidence that, before a legislative session in which measures affecting Grady would be debated, petitioner, in his official capacity, met with Ed Renford, Grady's chief executive officer, and suggested that Grady hire temporary workers from Georgia Personnel. Renford instructed his staff to meet with Georgia Personnel and told a human resources executive, in petitioner's presence, that "Senator Walker would be doing business with us at Grady Hospital and that he could help us with certain legislation." Gov't C.A. Br. 33. Renford also instructed the executive "to do business with Senator Walker's company and to do it right." *Id.* at 33-34. The hospital began using Georgia Personnel employees before bids were solicited and submitted, and it later permitted Georgia Personnel to resubmit its incomplete and untimely bid. After Georgia Personnel was awarded the contract, petitioner frequently complained that Grady was not using enough of his employees. Despite the human resources executive's complaints about the cost of Georgia Personnel's temporary employees, Renford required her to provide him with weekly reports documenting the use of petitioner's workers, but not those of other vendors. Pet. App. 24; Gov't C.A. Br. 33-35.

The government also introduced evidence that petitioner misrepresented his interest in the Augusta Focus to the Medical College so that the Augusta Focus could enter into contracts with that state entity, in violation of Georgia law restricting state politicians from contract-

ing with state agencies. The evidence established that, after the Medical College's in-house counsel told petitioner that the Medical College could not do business with a state official, petitioner told him that his wife owned the newspaper. When informed that the prohibition also applied to spouses, petitioner changed his story and implied that the paper's general manager owned it. Petitioner subsequently asked the general manger to sign a letter to the Medical College in which he falsely represented that he owned the Augusta Focus. Petitioner also failed to disclose his interest in the Augusta Focus and Georgia Personnel and his companies' contracts with the Medical College in financial disclosure forms submitted to the State. Gov't C.A. Br. 43, 47-49.

The district court instructed the jury on theories of both money-or-property mail fraud under 18 U.S.C. 1341 (2000 & Supp. V 2005) and honest services mail fraud under 18 U.S.C. 1346 for all relevant counts. Jury Instructions 9-10. The jury found petitioner guilty on 127 of the 137 counts, acquitting him only of a few of the mail fraud and tax fraud counts. Judgment 1-2; Verdict 3-5, 7. At sentencing, the district court deviated from the advisory Guidelines range of 87 to 108 months of imprisonment and sentenced petitioner to 121 months. Pet. App. 5. Petitioner challenged the application of the advisory Guidelines but did not contest the reasonableness of the sentence. Gov't C.A. Br. 50.

4. The court of appeals affirmed. Pet. App. 1-32. As to the *Batson* claims, the court of appeals first rejected petitioner's argument that the district court erred by treating white males as a cognizable group, on the ground that the district court clearly stated that it found purposeful discrimination on the basis of race alone. The court held that the district court did not err in con-

cluding that the government established a prima facie case of racial discrimination in light of the pattern of strikes and the totality of the circumstances, including petitioner's race and the nature of the charges. Pet. App. 11-13.

The court of appeals then held that the defendants satisfied their burden of asserting race-neutral explanations for their strikes. As to the final step, the court deferred to the district court's determination that the proffered explanations were pretextual and thus upheld its decision to reject petitioner's four peremptory strikes. Pet. App. 14-16. The court of appeals concluded:

> We have found no other indication in the record that the district court ignored compelling evidence or applied an incorrect legal standard. Nor do we find any evidence that the district court improperly shifted the burden of proof from the government to the Defendants anywhere along the way. In light of the deference owed to the district courts, and most particularly to their credibility findings, we must affirm the decision to award the government these four *Batson* challenges.

Id. at 16-17.

The court of appeals also affirmed the remedy. Noting that a district court is accorded significant latitude in fashioning an appropriate remedy for *Batson* violations, the court determined that the district court did not abuse its discretion, especially in light of the practical difficulties in granting replacement strikes to defendants. Pet. App. 17-19.

The court of appeals then considered the defendants' challenges to the sufficiency of the indictment and of the

evidence on the scheme involving Grady. It found that the indictment, which tracked the statute and alleged several facts supporting the scheme, was sufficient. In addition, the court held that the evidence sufficiently established that petitioner intended to participate in a scheme to benefit personally from his position as a legislator by promising that he would help with legislation benefitting Grady "in exchange for" Grady's hiring of temporary workers from Georgia Personnel. Pet. App. 20-25 & n.17.

As to the Medical College scheme, the court rejected the defendants' contention that federalism principles prohibit a conviction for honest-services mail fraud based on violations of non-criminal state ethics laws. The court reasoned that the defendants' convictions were not premised on the violation of state law and that proof of honest services mail fraud does not require a state-law violation. Pet. App. 26-27. It thus concluded that the jury could have found that petitioner "violated the mail fraud statutes by failing to disclose his relationship with the Medical College without considering the state ethics requirement." *Id.* at 27.

ARGUMENT

1. Petitioner contends that this Court's review is necessary to clarify the standards governing the application of *Batson* to a defendant's use of peremptory challenges to strike jurors. Petitioner's claims, which are either factbound or not properly presented, do not merit this Court's review.

a. Petitioner first contends (Pet. 14-17) that this Court's review is needed to clarify the standard of appellate review of a district court's finding that a defendant engaged in purposeful discrimination in exercising

his peremptory challenges. Specifically, he claims that the court of appeals erred by according "unfettered deference" (Pet. 17) to the district court's finding that petitioner engaged in purposeful discrimination against white jurors.

Batson established a three-step process for determining whether a prosecutor has discriminated on the basis of race in exercising peremptory challenges. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised a peremptory strike on a prohibited basis. *Id.* at 96-97. To make such a showing, the defendant must establish that the "relevant circumstances raise an inference" of racial discrimination. *Id.* at 96. Second, if that showing has been made, the government must come forward with a race-neutral explanation for the strike. *Id.* at 97-98. Third, if the government provides a race-neutral explanation, "the trial court must * * * decide * * * whether the opponent of the strike has proved purposeful racial discrimination." *Purkett* v. *Elem*, 514 U.S. 765, 767 (1995) (per curiam); *Batson*, 476 U.S. at 98. "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768.

The "ultimate question of discriminatory intent" is a "pure issue of fact," *Hernandez* v. *New York*, 500 U.S. 352, 364 (1991) (plurality opinion), that turns on "whether the trial court finds the prosecutor's race-neutral explanations to be credible," *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003). In turn, "[c]redibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Ibid.*; *Her-*

nandez, 500 U.S. at 365 ("There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge."). Because the trial court is best positioned to assess credibility, its determination of that issue receives "great deference on appeal" and is reviewed only for clear error. *Id.* at 364 (plurality opinion); see *Rice* v. *Collins*, 546 U.S. 333, 338 (2006).

In *Georgia* v. *McCollum*, 505 U.S. 42 (1992), the Court held that *Batson* applies to a defendant's discriminatory challenges on the basis of race. See *id.* at 59 ("[T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges."). Nothing in *McCollum* suggests that the standard for reviewing the district court's ultimate factual findings of discriminatory intent differs when the defendant's challenges are under review. Nor did petitioner argue below that a standard other than the clearly-erroneous test applies when the defendant's strikes are at issue. Pet. C.A. Br. 11. At bottom, petitioner's challenge amounts to a disagreement with the district court's factual findings that the defendants' race-neutral explanations were pretextual and the court of appeals' application of well-settled principles to the facts of this case. Those factbound claims do not warrant this Court's review.[4]

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[4] This Court has granted a writ of certiorari in *Snyder* v. *Louisiana*, No. 06-10119 (argued Dec. 4, 2007), to review, for the second time, the State's use of peremptory challenges in a capital case and the state courts' finding of no discrimination. It is extremely unlikely that the resolution of the questions presented in *Snyder* will affect the factbound question that petitioner raises here, and thus there is no reason to hold the petition in this case pending this Court's resolution of *Snyder*.

b. Petitioner next contends (Pet. 17-20) that the Court should resolve a conflict on whether white males constitute a cognizable group for *Batson* purposes. This case does not implicate that question.

As the court of appeals noted, "the district court clearly stated that it did *not* treat white males as a category in of itself. Rather, the court determined that Defendants engaged in intentional discrimination based on race." Pet. App. 12. Although petitioner claims that the court of appeals' statement is clearly erroneous, his factual challenge on that score does not warrant this Court's review. And because the court of appeals did not consider whether the *Batson* principles apply to the purposeful exclusion of white males, this case is an inappropriate vehicle to resolve that question.

In any event, it is unlikely that any conflict still exists on the question whether white males are a cognizable group, in light of this Court's decision in *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127 (1994), which held that the Equal Protection Clause prohibits peremptory challenges on the basis of gender as well as race. As the court of appeals noted, the cases that petitioner cites for the proposition that race/gender groups are not cognizable were decided before *J.E.B.*, Pet. App. 11-12 n.10, and petitioner has not cited any cases decided after *J.E.B.* that support the position that race/gender groups are not cognizable.

c. Petitioner also argues (Pet. 20-21) that the courts are divided on the question whether "mixed motive" challenges—strikes based on both impermissible factors and race-neutral reasons—are improper. This case is an inappropriate vehicle to consider that question.

Petitioner did not claim in the district court that his strikes were partially based on the impermissible factor

of race, but instead relied solely on purportedly race-neutral explanations. Although counsel for petitioner's co-defendants stated in passing that "[e]ven if you were to find that the strikes were motivated by two factors one of which is impermissible just because there is a dual motivation does not make it impermissible," 5/23/05 Tr. 274, defense counsel did not argue, as required when asserting mixed motives for the strike, that they would have struck the same jurors absent the improper motive. See, *e.g.*, *Gattis* v. *Snyder*, 278 F.3d 222, 234 (3d Cir.), cert. denied, 537 U.S. 1049 (2002); *United States* v. *Darden*, 70 F.3d 1507, 1531 (8th Cir. 1995), cert. denied, 517 U.S. 1149 (1996); *Howard* v. *Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993). For that reason, neither the district court nor the court of appeals applied a mixed-motive analysis to the defendants' peremptory challenges. This Court should decline to consider the issue in the first instance. See *FW/PBS Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below.").

d. Finally, petitioner argues (Pet. 21-24) that this Court's intervention is needed to resolve whether the district court's remedy of re-seating the impermissibly stricken jurors comports with petitioner's Sixth Amendment rights. Petitioner did not argue below that the remedy infringed his Sixth Amendment rights, and this Court should not consider that claim now.

Moreover, this Court has made clear that, "[i]n light of the variety of jury selection practices followed in our state and federal trial courts," it would "make no attempt to instruct these courts how best to implement our holding [in *Batson*]." *Batson*, 476 U.S. at 99-100 n.24. Nonetheless, it did specify, as one permissible op-

tion, the remedy ordered here: "disallow[ing] the discriminatory challenges and resum[ing] selection with the improperly challenged jurors reinstated on the venire." *Id.* at 100 n.24.

As explained in *Koo* v. *McBride*, 124 F.3d 869 (7th Cir. 1997), the "nature of the remedy must be determined by the nature and scope of the constitutional violation," and "the practicalities of the situation." *Id.* at 873. Here, the district court properly considered the nature of the violation; whether the remedy would reward defendants for engaging in unconstitutional conduct; the fact that defendants had agreed that the extra venire members should be dismissed before jury selection was completed; and the impracticalities in reconvening a new venire. Pet. App. 17-19. The court of appeals properly reviewed this factbound decision for abuse of discretion and affirmed.

2. Petitioner also contends (Pet. 24-29) that this Court should grant certiorari to resolve a conflict among the courts of appeals over the appropriate scope of honest services fraud under 18 U.S.C. 1346.[5] Petitioner, however, overstates the differences among the courts of appeals on the scope of Section 1346, and any differ-

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[5] Petitioner also states that there is "palpable discontent with the statute's ambiguity." Pet. 25. The courts of appeals have unanimously rejected claims that Section 1346 is void for vagueness. See, *e.g.*, *United States* v. *Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); *United States* v. *Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191, and 529 U.S. 1029 (2000); *United States* v. *Frost*, 125 F.3d 346, 370-371 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).

ences that do exist are not properly presented here. Accordingly, this Court's review is not warranted.

a. Petitioner contends (Pet. 27-29) that the courts of appeals disagree on whether, in cases charging public officials with honest services fraud, the government must present evidence of "some form of *quid pro quo*." Pet. 27. Although courts may vary in their formulations of the required relationship between the conduct underlying the fraud and the defendant's official acts, petitioner does not point to any case in which a court of appeals has reversed an honest services fraud conviction where, as in the Grady scheme, a public official demands personal benefits from a party *in exchange for* conferring legislative benefits. See Pet. App. 25 n.17 (The evidence established that petitioner participated in the Grady scheme "to enrich himself by using his legislative position as a bargaining tool."); Pet. App. 25 ("The jury could have inferred that * * * [petitioner] let Grady know that his legislative influence would be forthcoming in exchange for Grady hiring his temp workers."); *ibid.* (Petitioner communicated his belief that "he was entitled to the business in exchange for legislative assistance."). In other words, petitioner's bribery-like conduct in the Grady scheme would satisfy even the most stringent standards of honest services fraud. Accordingly, petitioner would not benefit from the review of any disagreement among the courts of appeals on this issue.[6]

b. Petitioner also contends that the courts of appeals disagree over whether "a violation of state law is a prerequisite to commission of the federal offense [of honest

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[6] Petitioner below did not challenge his conviction on the Medical College counts on this ground. Gov't C.A. Br. 46; Pet. App. 26.

services mail fraud]." Pet. 28. Regardless of any such disagreement,[7] this case is not a suitable vehicle for its resolution.

As to the Medical College counts, petitioner did not argue below that his conviction was invalid because the government failed to prove a state law violation; to the contrary, he argued that it was invalid on federalism grounds *because* it was premised on a (non-criminal) state law violation. CWW C.A. Br. 45-49; Gov't C.A. Br. 46-47. The court of appeals rejected that argument on the ground that the honest services fraud conviction for the Medical College counts was not in fact premised on a state law violation. Pet. App. 26-27. Therefore, petitioner should not be permitted to raise for the first time the opposite argument that the jury should have been required to find a state law violation.

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[7] The disagreement is lopsided in the Eleventh Circuit's favor, with only the Fifth Circuit requiring proof of a state law violation. Compare *United States* v. *Brumley*, 116 F.3d 728, 734 (5th Cir.) (en banc) ("[A] federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law."), cert. denied, 522 U.S. 1028 (1997), with *United States* v. *Hasner*, 340 F.3d 1261, 1269 (11th Cir. 2003) ("Proof of a state law violation is not required for a conviction of honest services fraud."), cert. denied, 543 U.S. 810 (2004); *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001) (same); *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995) (same); *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (declining to adopt requirement that defendant must have violated "some other rule of law"). Contrary to petitioner's assertion (Pet. 28), the Third Circuit does not require the government to prove that the defendant violated state law, let alone state *criminal* law. See *United States* v. *Panarella*, 277 F.3d 678, 693, 699 n.9 (3d Cir. 2002) (reserving issue whether "a violation of state law is always necessary for nondisclosure to amount to honest services fraud," while noting that the court had suggested in dicta that it is not).

Moreover, the indictment charged and the evidence established that petitioner defrauded the Medical College of money by fraudulently inducing it to enter into contracts with his companies, in violation of 18 U.S.C. 1341 (2000 & Supp. V 2005). Indictment 27-32; Gov't C.A. Br. 48-50. The jury was instructed on both money-or-property mail fraud and honest services mail fraud theories for all of the Medical College counts, Jury Instructions 9-10, and the jury returned a general guilty verdict on all of those counts, Verdict 3-4. Because petitioner's conduct involved a scheme to defraud the Medical College of money, Gov't C.A. Br. 48-50, and because petitioner on appeal neither challenged that theory nor contended that it was insufficient to support his convictions, Pet. C.A. Br. 14; CCW C.A. Br. 45-49, this case is an unsuitable vehicle for further consideration of the honest services fraud issue.[8]

3. After petitioner filed his petition, this Court decided *Gall* v. *United States*, 128 S. Ct. 586 (2007), and *Kimbrough* v. *United States*, 128 S. Ct. 558 (2007). Petitioner's request that the Court hold his petition pending decisions in those cases is therefore moot.

The district court found that a sentence above the advisory Guidelines range was warranted, and petitioner

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[8] In any event, Georgia law prohibits state officials from transacting business with state agencies and requires legislators to disclose their financial interests. Ga. Code Ann. §§ 45-10-24(a)(1), 45-10-26 (2002). Petitioner nevertheless transacted business with the Medical College (by misrepresenting his ownership interests in the relevant companies to the Medical College), and failed to disclose those transactions or his transactions with Grady on the state-mandated financial disclosure forms. Pet. App. 26-27; Gov't C.A. Br. 43-49; CWW C.A. Br. 14. Because petitioner apparently does not dispute that his conduct violated state law, petitioner would not benefit from the minority view requiring a state law violation.

did not challenge the reasonableness of his sentence below. Gov't C.A. Br. 50. This Court's decisions in *Gall* and *Kimbrough*, which extend greater deference to a district court to sentence outside the Guidelines, do not help petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

KIRBY A. HELLER
Attorney

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